FILED
MAR 1 - 2007
OFFICE OF THE CLERK
SUPREME COURT U.S.

No. 06-965

In the Supreme Court of the United States

THE CITY OF LUBBOCK, TEXAS,
AND ITS MAYOR,
Petitioners,

v.

OSCAR RENDA CONTRACTING, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, THE TEXAS MUNICIPAL LEAGUE, AND THE TEXAS CITY ATTORNEYS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

The *Amici* submit this brief in support of Petitioners, the City of Lubbock, Texas and its Mayor.[1] The National League of Cities ("NLC") is the country's largest and oldest organization serving municipal government, with more than 1,600 direct member cities and 49 state municipal leagues that collectively represent more than 18,000 United States communities. Founded in 1924, NLC strengthens local government through research, information sharing, and advocacy on behalf of hometown America. The Texas Municipal League (TML) is a nonprofit association of approximately 1,080 Texas cities that provides educational, legislative, and legal services to our members. The Texas City Attorneys Association, an affiliate of TML, is an organization of over 400 attorneys who represent Texas cities and city officials in the performance of their duties. The *amici* collectively work to better local government and show to the broad application of specific issues to local governments generally. Their interest in this case arises from the fact the case does not affect just Lubbock, Texas, but effects all local governments.

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[1] Pursuant to this Court's Rule 37.2, letters of consent from both parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, amici represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The question presented in the Petition for Certiorari is one of exceptional importance to local governments throughout the United States. The economic effects on local governments of allowing unsuccessful bidders to maintain federal litigation in the form of First Amendment retaliation claims are significant, potentially consuming millions of dollars and other resources each year.

ARGUMENT

The *amici* respectfully requests that this Court grant the City's petition for certiorari because this case involves an important federal question in need of resolution by this Court. While only two courts of appeal appear to have reached opposing decisions on this issue, several other courts have noted the need for resolution of the issue. In addition, lower federal courts are reaching decisions contrary to each other and contrary to the opinions of the two courts of appeal.

I. The Importance of Ruling on the Question of Whether Unsuccessful Bidders Can State a First Amendment Claim Absent an Existing Economic Relationship

In *Board of County Comm'rs of Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668, 685 (1996), this Court stated it "need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely" on a pre-existing relationship. The time has come for the Court to address this question. The number of local governments in existence today, coupled with the shear magnitude of government contracting and purchasing

decisions, shows why the time is ripe for the Court to consider this question.

The United States is comprised of 3,034 counties, 19,431 municipalities and 16,506 townships. See, THE MUNICIPAL YEAR BOOK 2004, International City/County Management Association xi (2004) (citing U.S. Census data for 2002). Thus, nearly 40,000 local governments are potentially affected by the viability of suits claiming First Amendment retaliation in the competitive bid process. The vast majority of these jurisdictions have less than 50,000 inhabitants. *Id.* at xii-xiii. Many do not have full-time counsel.

These jurisdictions face a serious, and potentially disastrous, financial burdens if the Fifth Circuit's holding that unsuccessful bidder's can state a claim for First Amendment retaliation any time they fail to secure a local government contract is correct. Local governments will not only have their bid processes disrupted, but will also likely face the imposition of attorneys fees under 42 U.S.C. §§ 1983 and 1988 in cases where bidders successfully litigate their claims. As Justice Scalia noted in his dissent to *Umbehr* and *O'Hare Truck Service, Inc. v. City of North Lake*, 518 U.S. 712 (1996), if a First Amendment retaliation claims exists on the part of an unsuccessful bidder with no pre-existing relationship, "all government entities, no matter how small, are at risk of § 1983 lawsuits for violations of constitutional rights." 518 U.S. at 697. This seems unnecessary in light of the fact that unsuccessful bidders with meritorious claims can be made whole under current administrative procedures which govern the procurement process in most states.

Section 1983 lawsuits come with significant financial penalties for local governments, beyond merely the outlay of resources in defending the suits. A recent survey of attorneys'

fee calculations in sixteen federal civil rights cases in California covering the years 2000 and 2001 found that federal courts awarded attorneys fees with an average amount awarded of over $150,000. Michael Koa, *Calculating Lawyers Fees: Theory and Reality*, 51 U.C.L.A. L. Rev. 825, 841 (2004). An average award in state court amounted to more than $65,000. *Id.* at 841. The size of such awards, coupled with the cost of defending a federal lawsuit, can create havoc with local government budgets.

To place attorney fee awards in context, in 2004, police and sheriff's patrol officers had median annual earnings of $45,210, while median hourly earnings of firefighters were $18.43 (assuming a 40 hour work week, this amounts to a yearly salary of approximately $38,000). *See Occupational Outlook Handbook*, Bureau of Labor Statistics, Department of Labor, available at http://stats.bls.gov/oco/ocos160.htm and http://stats.bls.gov/oco/ocos158.htm. More than three police officer or four firefighter positions may need to be eliminated as a result of an attorney fee award of $150,000 against a local government.

As a result, local governments may choose to settle even non-meritorious bid protests rather than endure litigation and face a possible loss, expending scarce resources. These chilling effects are widely recognized. In a 2002 article in the Pittsburgh Tribune-Review, constitutional law Professor Arthur Hellman stated that, because of the threat of attorney's fees, "[t]here will still be strong incentives (for defendants) to settle cases," and "[o]fficials are going to think twice" about pursuing cases to trial. *See* Joseph D. Wilcox, *Legal Fees Can Add Up In Civil Rights Cases*, Pittsburgh Tribune-Review, Dec. 2, 2002, available at http://www.pittsburghlive.com/x/search/s_105525.html.

Viewed from a different angle, the magnitude of the number of contracting and procurement decisions engaged in by all levels of government in the United States shows what an impact allowing these types of claims could have on the court system, in addition to the effect on local governments. Services which offer to assist contractors locate contracting opportunities note there are 2,000 to 5,000 new government contracting opportunities *every day*. *See, e.g.*, *Find* RFP, Frequently Asked Questions-No. 5, available at http://www.findrfp.com/service/faq.aspx. The District of Columbia alone enters into approximately 21,000 contracts, worth approximately $3.75 billion, each year. *See*, District of Columbia Contracting and Procurement Task Force Report, December 4, 2006 available at http://www.dcwatch.com/govern/ocp061204.htm. In 1997, state and local governments spent approximately 750 billion dollars annually procuring goods, supplies, equipment, services, and construction. The number of procurement transactions continues to rise each year as the federal government shifts program responsibilities to state and local governments. *See*, 2002 ABA Model Procurement Regulations at v, available at http://kppanigp.org/Docs/Code_and_Regs.pdf.

It is not know how many bidders vie for each contracting opportunity, but if even one bidder is unhappy with the result of the bid process for each of these contracting opportunities and files a federal lawsuit, the courts will quickly be over run. Local government coffers will quickly drain in an effort to simply cover litigation costs.

A better method of ensuring local governments complete their bid processes correctly and fairly would be to allow the administrative procedures already in place to function as intended. This would both vindicate the rights of the injured unsuccessful bidder and protect the public fisk from the heavy

penalties of federal civil rights litigation. Without this Court's review and reversal of the Fifth Circuit's decision, Justice Scalia's prescient statement in *Umbehr* will surely come to pass; to wit: ". . . the First Amendment will produce an entitlement to the contract, or at least guarantee a lawsuit." 518 U.S. at 701 (Scalia, J. dissent).

CONCLUSION

For the above reasons, the amici respectfully request this Court grant the City's petition for certiorari.

Respectfully submitted,

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